No. _____

In The

Supreme Court of the United States

October Term, 1989

FIRST NATIONAL BANK OF BELLAIRE,

Petitioner,

vs.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS – COUNTY OF HARRIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

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QUESTION PRESENTED

Whether the Texas ad valorem tax system unconstitutionally diminishes the property interest of a lienholder in violation of the due process clause of the Fourteenth Amendment by authorizing the State's taxing agencies to increase the tax appraised and the tax burden on real property annually and legislatively subordinating all pre-existing liens on the property to the statutory tax lien, without providing for notice of and an opportunity to contest the increase to the holders of the pre-existing liens.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioner First National Bank of Bellaire and the Respondents Huffman Independent School District and the State of Texas – County of Harris. The same parties are before this Court.

The affiliates of Petitioner First National Bank of Bellaire are: First Bank of Deerpark; Gold Eagle Life Insurance Company, Phoenix, Arizona; Mayde Creek Bank, N.A.; Texas Coastal Bank, Pasadena, Texas; and Texas National Bank of Baytown. First National Bank of Bellaire has no parent companies or subsidiaries.

RULE 28.4(c) NOTICE

Since the proceeding draws into question the constitutionality of sections of the Texas Tax Code, and the Attorney General of Texas takes the position that neither the State of Texas nor any agency, officer, or employee of the State of Texas is a party, it is noted that title 28, United States Code, section 2403(b) may be applicable.

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To the Supreme Court of the United States:

First National Bank of Bellaire ("Bellaire"), Petitioner, respectfully prays that a writ of certiorari issue to review the final judgment and opinion of the Court of Appeals for the Fourteenth District of Texas at Houston, dated February 23, 1989. That court held that Bellaire was not deprived of a property interest without due process of law when, pursuant to the Texas ad valorem tax scheme, the Respondent taxing units increased the appraised value of real property upon which Bellaire had a prior deed of trust lien, reassessed the taxes, and automatically obtained a superior statutory lien to secure the increased

taxes, without giving Bellaire notice of these actions or an opportunity to contest them.

OPINIONS BELOW

The opinion of the Texas court of appeals, which appears in the appendix hereto, is reported at 770 S.W.2d 571 (Tex. App. – Houston [14th Dist.] 1989, writ denied). The final judgment of the district court, which also appears in the appendix hereto, is not reported.

JURISDICTION

The original judgment of the court of appeals was entered on February 23, 1989. Bellaire timely filed its motion for rehearing which was overruled on March 23, 1989.

Bellaire timely filed an application for writ of error to the Texas Supreme Court, which was denied on June 28, 1989. A motion for rehearing of that denial was overruled on October 11, 1989. On October 26, 1989, pursuant to Bellaire's motion, the court of appeals stayed mandate until January 24, 1990.

This petition is filed in this Court within ninety (90) days from the overruling of rehearing below. The jurisdiction of this Court is invoked under title 28, section 1257(a), United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of . . . property, without due process of law."

Section 32.01 of the Texas Tax Code provides:

> On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on that property, whether or not the taxes are imposed in the year the lien attaches. The lien exists in favor of each taxing unit having power to tax the property.

Section 32.05(b) of the Texas Tax Code provides, in relevant part:

> [A] tax lien provided by this chapter takes priority . . . over the claim of any holder of a lien on property encumbered by the tax lien, whether or not the debt or lien existed before attachment of the tax lien.

Section 25.19(a) of the Texas Tax Code provides, in relevant part:

> [T]he chief appraiser shall deliver a written notice to a property owner of the appraisal value of his property if:
>
> (1) the appraised value of the property is greater than it was in the preceding year;
>
> (2) the appraised value of the property is greater than the value rendered by the property owner; or
>
> (3) the property was not on the appraisal roll in the preceding year.

Section 41.41 of the Texas Tax Code in effect at the time provided:

> A property owner is entitled to protest before the appraisal review board the following actions:
>
> (1) determination of the appraised value of his property or, in the case of land appraised as provided by Subchapter C, D, or E, Chapter 28 of this code, determination of its appraised or market value;
>
> (2) unequal appraisal of his property in comparison to the median level of appraisals of other property in the appraisal district;
>
> (3) inclusion of his property on the appraisal records;
>
> (4) denial to him in whole or in part of a partial exemption;
>
> (5) determination that his land does not qualify for appraisal as provided by Subchapter C, D, or E, Chapter 23 of this code;
>
> (6) identification of the taxing units in which his property is taxable in the case of the appraisal district's appraisal roll;
>
> (7) determination that he is the owner of property; or
>
> (8) any other action that applies to the property owner and adversely affects him.

Section 42.01 of the Texas Tax Code provides, in relevant part:

A property owner is entitled to appeal:

(1) an order of the appraisal review board determining a protest by the property owner as provided by Subchapter C of Chapter 41 of this code . . . .

Section 42.09 of the Texas Tax Code provides:

(a) Except as provided by Subsection (b) of this section, procedures prescribed by this title for adjudication of the grounds of protest authorized by this title are exclusive, and a property owner may not raise any of those grounds:

(1) in defense to a suit to enforce collection of delinquent taxes; or

(2) as a basis of a claim for relief in a suit by the property owner to arrest or prevent the tax collection process or to obtain a refund of taxes paid.

(b) A person against whom a suit to collect a delinquent property tax is filed may plead as an affirmative defense:

(1) if the suit is to enforce personal liability for the tax, that the defendant did not own the property on which the tax was imposed on January 1 of the year for which the tax was imposed; or

(2) if the suit is to foreclose a lien securing the payment of a tax on real property, that the property was not located within the boundaries of the taxing unit seeking to foreclose the lien on January 1 of the year for which the tax was imposed.

(c) For purposes of this section, "suit" includes a counterclaim, cross-claim, or other claim filed in the course of a lawsuit.

STATEMENT OF THE CASE

A. The issue presented and the Texas tax system.

Bellaire seeks review of a Texas court of appeals' decision that a lienholder is not deprived of a property interest without due process of law when, under the Texas Tax Code ("Code"), the taxing agencies increase the appraised value of the property, reassess the taxes, and impose a superior lien on the property without providing the prior lienholder any notice of or opportunity to contest these actions.

Under Texas law, a "super-priority" lien automatically arises each year in favor of the taxing authorities to secure taxes assessed on all real property subject to its jurisdiction. The tax lien has priority over all other liens on the property (including pre-existing contractual liens) as of January 1 of each year for the taxes assessed during that year. Tex. Tax. Code Ann. § 32.01 (Vernon Supp. 1990) (tax lien automatic) & § 32.05 (Vernon 1982) (priority over pre-existing liens). Once the tax liability is finally established, the lien becomes immutable, and those with an interest in the property can preserve that interest only by payment of the tax. An increase in the tax liability (*i.e.*, the amount secured by the tax lien) of course correspondingly diminishes the value of the interests of the owner and other lienholders.[1]

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[1] There are, of course, circumstances in which even a decrease in the tax bill could diminish the lienholder's interest.

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Under the Code, the taxing authority may reassess the taxes that are secured by the automatic lien each year. It must give notice to the landowner when a tract of real property is reappraised at a higher value and taxes on the property are correspondingly increased. It must also provide the landowner an administrative hearing upon request to allow him to contest the appraisal and assessment. A landowner dissatisfied with the results of the hearing may appeal the administrative decision to district court. The Code prohibits appeal to the court, however, unless the landowner has participated in the administrative process.

The Code provides for no similar notice or opportunity for a hearing to lienholders, nor does it permit lienholders to contest the extent of the tax lien which automatically becomes superior to their interest in the property. Tex. Tax. Code Ann. § 25.19(a) (Vernon Supp. 1990) (notice of increase in appraisal given only to owner), § 41.41 (Vernon Supp. 1989) (right of protest and hearing available only to owner) & §§ 42.01-.031 (Vernon 1982 & Supp. 1989) (right to appeal to district court available only to owner, chief appraiser, county and taxing unit). With limited exceptions not applicable here[2],

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Accordingly, from a constitutional standpoint the State should be required to furnish notice and an opportunity to contest to the lienholder in all events. In this case, however, the tax burden (and thus the amount secured by the State's superpriority lien) was increased and Bellaire's bargained-for position was unquestionably prejudiced.

[2] As of May 1987, any "person" against whom suit is filed to collect a tax may assert that (1) he was not the owner of the

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the remedies provided in the Code are exclusive. Tex. Tax. Code Ann. § 42.09 (Vernon Supp. 1990).

The Texas tax scheme thus creates a "catch-22" situation. The lienholder, who clearly has a vested, material interest in the property, is excluded by law from the administrative process by which that interest often is materially and substantially affected. He is not literally excluded from the courthouse, but, as the courts below held in this case, the court can grant no relief because the lienholder did not participate in the administrative process. As discussed below, no common-law or other remedies not provided in the Code may be asserted. Thus, lienholders are deprived of the opportunity even to be heard at any point in the process by which their vested property rights are materially affected. It is the constitutionality of this system as applied to lienholders that is at issue in this case.

B. Facts of this case and proceedings below.

During the years 1984 and 1985, I.T. May, Jr. ("May") owned a 1,000 acre tract of land upon which Bellaire held a first and superior deed of trust lien. (Tr. 41) After

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property subject to the tax and avoid personal liability for the tax, or (2) the property was not within the taxing unit's jurisdiction, and avoid foreclosure of the tax lien. Prior to 1987, a person could not even assert as a defense in a suit to collect taxes that he was not the owner of the property subject to the tax, since the remedies in the Tax Code are exclusive. *Robstown Indep. School Dist. v. Anderson*, 706 S.W.2d 952 (Tex. 1986).

Bellaire's lien attached, a portion of the property consisting of 379.74 acres was reappraised by the Respondent taxing authorities, resulting in a significant increase in the appraised value and taxes on the property. (Tr. 41-42) May, who at the time was apparently in financial difficulties, failed to contest the tax appraisal or assessment. The taxing authority did not give Bellaire notice of the increased appraisal and assessment, or an opportunity to contest them. (Tr. 41)

May did not pay the 1985 taxes on the property, and the superior statutory tax lien automatically attached to secure the delinquency. Respondent Huffman ISD then initiated this litigation against May to collect the delinquent taxes through foreclosure of the statutory tax lien. (Tr. 2, 25)

During that same time period, May also defaulted in payment of the debt secured by Bellaire's deed of trust. As a result of the default, on January 7, 1986, Bellaire foreclosed its lien and purchased the property at foreclosure. (Tr. 41) Huffman ISD then impleaded Bellaire as owner of the property.

Having become owner of the property, Bellaire was given notice of the 1986 assessments. Bellaire contested the appraisal and assessments, and obtained a reduction in the appraised value of $1,000.00 per acre and a corresponding significant reduction in the taxes assessed on the property. (Tr. 42)

Huffman ISD, State of Texas – County of Harris, which had intervened in the suit to foreclose its lien for 1985 taxes, and Bellaire each filed cross-motions for summary judgment, joining issue on the questions of whether

Texas law permits a lienholder such as Bellaire to contest in any forum the extent or amount of the taxes and lien securing them and whether the lienholder is entitled for due process purposes and under the Code, to notice of and an opportunity to contest the tax appraisal, assessment, and lien before the increased tax debt becomes final and secured by the superior tax lien.[3] (Tr. 7, 15, 35) The trial court denied Bellaire's motion for summary judgment, thus precluding Bellaire from challenging the extent of the assessment and lien, and granted the motion of the taxing authorities establishing their liens as first and superior liens on the property and ordering foreclosure. (Tr. 82)

The court of appeals affirmed the trial court's summary judgment, holding that Bellaire was not deprived of a property interest without due process since Bellaire was not personally obligated to pay the taxes. *First Nat'l Bank v. Huffman Indep. School Dist.*, 770 S.W.2d 571, 573 (Tex. App. – Houston [14th Dist.] 1989, writ denied). That court also held that the Code does not require notice to Bellaire

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[3] Bellaire raised the question in the district court of the deprivation of its Fourteenth Amendment due process rights in its motion for summary judgment, its response to Respondents' motions for summary judgment, and its first amended answer. Bellaire asserted that the tax lien was not superior to its lien since it was not afforded notice of or an opportunity to contest the 1985 tax appraisal and assessment before the tax became final in violation of the Fourteenth Amendment and contrary to this Court's holding in *Mennonite*. Alternatively, Bellaire requested that the court reduce the 1985 appraised value of the property that Bellaire contends greatly exceeded the fair market value of the property. (Tr. 36, 37, 39, 73).

of the appraisal and assessment process and indeed that the Code precludes Bellaire from contesting any aspect of the tax liability. *Id.*[4]

The court attempted to distinguish this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), in which this Court held that a lienholder was unconstitutionally deprived of a property interest when a taxing authority, without prior notice to a lienholder whose identity was reasonably ascertainable, took action that had the effect of imposing a lien on the property superior to the lienholder's interest. The Texas appellate court construed the holding in *Mennonite* as requiring that notice be given to lienholders only prior to the sale of the property to pay the tax,[5] rather than prior to the final establishment of the tax liability secured by the tax lien. *Id.* The court totally ignored the applicability of the due process requirement of an opportunity to be heard.

Bellaire reiterated in its application for writ of error to the Texas Supreme Court its claims that the Texas tax scheme, which precludes it from participating in the process at any level, deprives Bellaire of its rights to due

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[4] Bellaire raised the question of the deprivation of its Fourteenth Amendment due process rights in points of error numbers one and two in its appellant's brief in the court of appeals. Appellant's brief at 8. The court of appeals overruled both these points of error. *First Nat'l Bank v. Huffman Indep. School Dist.*, 770 S.W.2d 571, 573 (Tex App. – Houston [14th Dist.] 1989, writ denied).

[5] As discussed below, the term "tax sale" has a meaning in the Texas system different from its meaning under the Indiana scheme at issue in *Mennonite*. The court of appeals ignored this critical difference.

process under the Fourteenth Amendment.[6] The Texas Supreme Court, however, denied the application.

REASONS FOR GRANTING THE WRIT

A. This is a case of substantial nationwide importance.

The decision of the Texas court of appeals leaves intact an ad valorem tax scheme that permits a taxing agency to significantly diminish a lienholder's property interest through the reappraisal and assessment process without providing any meaningful opportunity for the lienholder to object to the agency's actions. This tax scheme as construed by the Texas courts offends the Fourteenth Amendment and emasculates this Court's holding in *Mennonite* by allowing empty notice to a lienholder of an impending foreclosure sale after the tax lien has attached and the tax is final, and by totally precluding the lienholder from contesting the amount secured by the lien.

The issues raised are significant to taxing authorities and lienholders in Texas and elsewhere.[7] As discussed

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[6] Bellaire raised the question of the deprivation of its Fourteenth Amendment due process rights in points of error numbers one and two in its application for writ of error to the Texas Supreme Court. Application at 3-4.

[7] As stated by Respondent Huffman ISD in its motion to publish the opinion of the court of appeals, this case

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below, the states have employed a variety of alternatives in their efforts to identify and comply with the requirements of the Fourteenth Amendment. This Court's guidance is needed throughout these jurisdictions.

In some states, any "taxpayer" or "property owner" has standing to challenge the appraisal and assessment of taxes on *any* real property within the jurisdiction of the taxing authority. *E.g.* Ark. Code Ann. § 26-27-317 (1987) ("any property owner" has standing); Revenue Act of 1939 § 117, Ill. Ann. Stat. ch. 120, para. 598 (Smith-Hurd Supp. 1989) ("any taxpayer" may complain); West Va. Code § 11-1B-11 (1987) ("[a]ny person who is a taxpayer of ad valorem property taxes" for good cause may protest an appraisal). The obvious advantage of these systems affording broad standing is that inequities in the taxing scheme and improper dispensation of tax favors can be more frequently challenged and corrected.

At the opposite end of the spectrum, Texas appears to be one of the most restrictive systems by affording only property owners whose land is affected standing to challenge the actions of the taxing agencies. The Texas legislature and courts have historically been hostile to taxpayer challenges to most aspects of the taxation system. As

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"involve[s] a legal issue of continuing public interest," and "ad valorem taxes are assessed and levied throughout the State of Texas and many lienholders are of the misconception that they are [entitled to notice of the appraisal and assessment and an opportunity to contest it]."

observed by Mark Yudof, the dean of the University of Texas School of Law[8],

> [The Texas Courts] have imposed upon themselves a remedial framework, which at times jeopardizes the financing of public services without making any progress toward compliance with constitutional and statutory dictates. In short, courts must bear a significant share of the blame for the lawless and inequitable operation of the Texas property tax system.
>
> . . . They show little inclination to exercise their judicial powers in a forceful fashion to bring a halt to the lawless activities of assessors, local governing bodies, and boards of equalization.

Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 Tex. L. Rev. 885, 896 (1973).

Several states take a middle ground and allow a person "aggrieved" to contest the assessment. *E.g.*, Kansas Stat. Ann. § 79-1409 (1984) ("any person feeling aggrieved" may appeal); N.Y. Real Prop. Tax Law § 704 (McKinney 1984) ("aggrieved" person may seek judicial review of assessment); Va. Code Ann. § 58.1-3350 (Supp. 1989) ("any person aggrieved by an assessment may apply for relief"); Wyo. Stat. § 39-1-305 (1985) ("[a]ny person aggrieved by any assessment may apply for relief"). Massachusetts expressly allows a mortgagee who pays at least one-half of the tax to challenge the assessment. Mass. Gen. Laws Ann. ch. 59, § 59 (West 1988), *amended by* Act approved Aug. 15, 1989, ch. 341, § 38, 1989 Mass. Legis. Serv. 711, 715 (West).

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[8] Dean Yudof's observations predated the enactment of the Texas Tax Code. As discussed below, however, they are equally applicable to the current system.

Some of these systems clearly preclude a challenge by a person whose property interests are diminished by a taxing authority's actions. *Cf., In re Suburbia Fed. Sav. & Loan Ass'n v. Mayor*, 76 A.D.2d 841, 428 N.Y.S.2d 323, *appeal denied*, 52 N.Y.2d 702, 417 N.E.2d 1013, 436 N.Y.S.2d 1026 (1980) (mortgagee is not "aggrieved" person and cannot challenge tax assessment on property unless it demonstrates that it cannot recover the tax from the property or through a deficiency judgment); *Choate v. Board of Assessors*, 304 Mass. 298, 23 N.E.2d 882 (1939) (mortgagee cannot challenge assessment unless it first pays the tax). This is an appropriate case by which the Court can provide uniform guidance as to the Fourteenth Amendment's limits on the State's ability to affect vested rights without notice or an opportunity to be heard. If the Court declines this opportunity, regardless of how the states couch their standing requirements for challenging a taxing agency's actions, due process protections for those whose property interests are significantly affected may be ignored, as in this case.

B. The Texas system denies the lienholder due process.

Without question, due process requires that a landowner must be afforded some opportunity to challenge the administrative action of a taxing agency that increases the appraised value of land and, correspondingly, the tax assessed, because such actions result in the land being burdened by a lien to secure the increased tax. *E.g., Turner v. Wade*, 254 U.S. 64 (1920); *Security Trust & Safety Vault Co. v. City of Lexington*, 203 U.S. 323 (1906). Importantly, the landowner is entitled to an opportunity to

contest the State's actions *before* his property interests are diminished. *Id.*

There is no legal or practical justification for treating differently the mortgagee, who is deprived of its priority lien interest in the land through imposition of the superior tax lien. That is especially true since a "mortgagee's interest may, and often does, exceed the owner's interest in the property." *Seattle-First Nat'l Bank v. Umatilla County*, 77 Or. App. 283, 713 P.2d 33, 36, *review denied*, 300 Or. 704, 716 P.2d 758 (1986).

In *Mennonite*, this Court categorically held the mortgagee's interest in the land, like the landowner's, is a protected property interest that cannot be diminished by the imposition of a superior tax lien without affording the mortgagee notice and a meaningful opportunity to contest the action. This Court "recognized that prior to an action which will *affect* [a lienholder's interest], a State must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Mennonite*, 462 U.S. at 795 (emphasis added).

Moreover, this Court has recently confirmed that, contrary to the holding of the Texas court in this case, the State must afford due process to those whose property interests it adversely affects in any way. In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), the Court held that, while the State's action in holding a tax sale in *Mennonite* "did not even completely extinguish the mortgagee's claim, it merely 'diminish[ed] the value' of the interest; nevertheless, that deprivation required that due process be afforded." *Id.*, 108 S. Ct. at 1344, 1346.

Thus, a "deprivation" triggering due process protections occurs whenever the lienholder's property interest is "adversely affected" by state action.

These fundamental concepts of due process and fairness are not novel or of recent vintage. *E.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("[T]here can be no doubt that at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication [must] be preceded by notice and opportunity for hearing appropriate to the nature of the case.") Thus, before the State takes some action directed at diminishing a specific property interest, it must provide the interest owner an opportunity to "present its objections" and contest the proposed action in some meaningful way. *Mennonite*, 462 U.S. at 795.

The patent manner in which the Texas scheme deprives a lienholder of due process is graphically illustrated by this case. Bellaire's property interest (its first lien) was adversely affected and diminished to the extent of the increased appraisal and corresponding increase in taxes assessed, which became automatically secured by a superior statutory lien. In this case, the property valuation and taxes assessed were significantly increased without affording Bellaire even the opportunity to protest, and Bellaire's interest was correspondingly diminished to the extent of the lien securing the taxes assessed.[9] As the Texas court held in this case, however, under Texas law

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[9] State of Texas – County of Harris conceded in the Texas court of appeals that the lien and the 1985 taxes it secured would have been reduced if the appraisals and assessments

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Bellaire had no right to notice or a right to contest the agency's actions either at the administrative level or in court. *Huffman*, 770 S.W.2d at 573; *see also Bennett-Barnes Invs. Co. v. Brown County Appraisal Dist.*, 696 S.W.2d 208 (Tex. App. – Eastland 1985, writ ref'd n.r.e.) (only the property owner can contest the appraisal, assessment, and imposition of the lien.) Only the landowner is afforded that opportunity.[10] Indeed, Bellaire was precluded by summary judgment from contesting the extent of the tax lien in this case.

Since under *Mennonite* and *Pope*, Bellaire's lien constituted a protected property interest that was diminished by the actions of the Respondent taxing authorities and by operation of law, it was denied due process when it

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had been challenged. Brief of State of Texas – County of Harris in court of appeals at 14. This fact is confirmed by the significant reduction in the appraisal in 1986 when Bellaire, which had become owner of the property, contested it.

[10] As stated above, the remedies provided in the Tax Code are exclusive. Tex. Tax Code Ann. § 42.09 (Vernon Supp. 1990). The Texas Supreme Court has even held that a person who is not the owner of the property subject to the tax had no remedy outside those prescribed in the Code to raise non-ownership as a defense. *Robstown Indep. School Dist. v. Anderson*, 706 S.W.2d 952 (Tex. 1986). Following *Robstown*, however, the Legislature made an exception to the exclusivity provisions of section 42.09 and provided that a "person" sued for delinquent taxes could defend on the ground that he did not own the property subject to the tax. That amendment may have remedied the constitutional infirmities in the tax scheme in that specific context, but only emphasizes the scheme's unconstitutionality as applied to lienholders.

was precluded from presenting any objections. Empty notice that the superior tax lien already established is about to be foreclosed, without an opportunity to contest the State's actions, does not comport with the principles of *Mennonite* or the Fourteenth Amendment.

C. The Texas court of appeals failed to recognize Bellaire's protected property interest that was affected by the Texas tax scheme and misconstrued *Mennonite*.

The court of appeals' analysis of the due process issue is fundamentally flawed. That court held that Bellaire was not deprived of any property interest since the taxes were not assessed against it "personally," but rather against the owner. *Huffman*, 770 S.W.2d at 573. That is, the court reasoned that Bellaire was not personally liable for the taxes, and therefore had no property interest that was affected by the increased tax assessment.

This analysis is predicated upon a misunderstanding of the property interest at stake, and ignores the real impact of the tax assessment and lien under the Texas statute. Bellaire had a real and substantial interest in the property by virtue of its deed of trust lien, which attached prior in time to any action by the Respondent taxing authorities. When the property was reappraised and the taxes increased, the statutory tax lien superior to the lien held by Bellaire arose automatically and significantly diminished Bellaire's interest. It is Bellaire's interest in the property that is at stake, not its personal liability to the taxing agency for the taxes. Bellaire's property interest was expressly recognized in *Mennonite*, as was its entitlement to constitutional protection.

Moreover, when, as in this case, the owner ignores the assessment process and refuses to pay the taxes, as a practical matter the lienholder has only two choices: it must pay the taxes or lose its interest in the property.[11] For this reason, the lienholder is no less the "party assessed" than is the property owner. The only difference in their respective liability for the tax, once it becomes final and the statutory lien attaches, is the pool of property against which payment may be enforced. At that point, of course, not even the owner can contest the tax liability. To hold, as the court of appeals did in this case, that a lienholder is not entitled to due process protections because it is not the "party assessed" is erroneously literal and completely ignores the dramatic effect of the statutory tax lien on the lienholder's constitutionally protected interest.

Moreover, the court of appeals' analysis in that regard is squarely at odds with *Mennonite*. In the Texas court's view, *Mennonite* requires at most that notice be given to lienholders only when the State is about to foreclose its tax lien, and not during the appraisal and assessment process, and that *Mennonite* does not require the State to afford lienholders an opportunity to protest. That interpretation, however, cannot be reconciled with the facts of the *Mennonite* case.

Under the Indiana taxation scheme involved in *Mennonite*, the "tax sale" was not a sale at all in the conventional sense; it merely gave the taxing authority (or other

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[11] The right of redemption in Texas is available only to the owner of the property. Tex. Tax Code Ann. § 34.21 (Vernon 1982).

"purchaser" at the "sale") a lien on the property superior to that of the contractual lienholder. Title did not pass, and the lienholder's interest was not extinguished, until the expiration of a two-year redemption period. This Court determined, however, that the attachment of this lien through the "tax sale" so affected the lienholder's property interest that due process protections were required. The Court stated:

> The tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors.

Mennonite, 462 U.S. at 798.

This Court also reaffirmed in *Mennonite* the well-settled principle that due process must be afforded *prior to* an action which will affect an interest in property:

> [n]otice by mail or other means as certain to ensure actual notice is a *minimum constitutional precondition* to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice . . . .

Mennonite, 462 U.S. at 800 (first emphasis added).

The "tax sale" condemned in *Mennonite* is virtually identical in the pertinent respects to the administrative process under the Texas system. Both result in the imposition of a super-priority lien with power of sale, which in each case diminishes the interests of those holding liens that predate the State's tax lien. Both deprive those lienholders of their protected interests without notice or an opportunity to be heard. Both are unconstitutional.

It is insufficient simply to notify a lienholder that its interest has been diminished, yet that is precisely the effect of the decisions of the Texas courts in this case. Instead, to comport with constitutional requirements the lienholder must receive notice and an opportunity to contest the tax liability before it becomes final. The Texas system precludes these fundamental rights and is constitutionally infirm.

D. The taxing authorities' contention that affording due process to lienholders imposes too great an administrative burden was rejected in *Mennonite* and is wrong.

In the Texas courts, Respondents contended that to provide to lienholders notice and an opportunity to be heard is too great a burden. That argument, however, was expressly rejected in *Mennonite*. There, this Court held that due process must be given to lienholders whose identities are reasonably ascertainable. *Mennonite*, 462 U.S. at 798. This Court noted that a simple search of the real property records should reveal the identity of the lienholder and that notice may be easily and economically afforded through the mail. *Id.* That is not too great a burden when, as here, significant property interests are at stake.[12]

Moreover, if the taxing authority finds even those minimal due process protections required by *Mennonite* too onerous, there is an alternative. The due process

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[12] As noted above, some states allow *any* taxpayer standing to challenge any assessment and apparently do not find it too great an administrative burden.

safeguards come into play only because the taxing authority wants its lien to jump to the head of the queue. If the tax lien is relegated to its place in line behind earlier liens, then the lienholder's interests are not threatened, and there is no need for due process protections.

The Fourteenth Amendment would permit a tax lien to have priority over the liens of any earlier lienholders who were given proper notice of, and a meaningful opportunity to contest, the assessment of the tax or the imposition of the lien, but it requires that the tax lien be subordinate to the liens of those who were not given such notice and opportunity. Thus, under such a system, the taxing authority can very practically decide whether it wants to pay a minimal price for a priority lien, and act accordingly.

In most cases, the taxing agency will collect the tax from the landowner, and may for that reason determine not to send notice to lienholders. If notice is sent to the lienholder, the taxing authority may find that few lienholders will challenge the assessment, and may therefore conclude that it will suffer little other than postage costs by giving notice, and elect to do so. In all likelihood, only a very few cases will result in challenges from lienholders, and the taxing agency may sidetrack every such challenge merely by acknowledging the subordinate status of its own lien. Each step of the way, the taxing agency will have determined the investment it is willing to make in a priority lien, and the administrative burden may be light indeed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that its petition be granted and that the judgment and decision of the court of appeals be reversed and judgment rendered that Respondents take nothing, or alternatively that this case be remanded for trial or other proceedings.

Respectfully submitted,

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Attorneys for Petitioner
First National Bank of Bellaire

*Counsel of Record

APPENDIX A

Affirmed and Opinion filed February 23, 1989.

[Seal]

IN THE
FOURTEENTH COURT OF APPEALS

NO. A14-88-00352-CV

FIRST NATIONAL BANK OF BELLAIRE, Appellant

V.

HUFFMAN INDEPENDENT SCHOOL DISTRICT, ET. AL., Appellees

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 86-32290

OPINION

In this case involving the collection of ad valorem taxes, First National Bank of Bellaire ("the Bank") alleges that portions of the Property Tax Code are unconstitutional. In three points of error the Bank claims (1) the provision of the Property Tax Code which provides for notice of the appraised value of property to only the property owner is unconstitutional; and (2) the term "property owner" in the Property Tax Code should be construed to include a lienholder. We affirm.

In July 1986 Huffman Independent School District ("Huffman") filed suit against I. T. May, Jr. to collect delinquent ad valorem taxes on several tracts of property

located in Huffman, Texas. The taxes were unpaid for the 1985 tax year when May was the owner of the property and the Bank was the lienholder. On January 7, 1986, the Bank foreclosed on a 379.74 acre tract of land, on which delinquent taxes were owed by May. Huffman brought the Bank, as the new owner of the property, into its suit for delinquent taxes.

Huffman and the Bank then filed motions for summary judgment. Huffman's motion alleged Huffman was entitled to judgment as a matter of law because there was no dispute that the Bank owned an interest in the property and that property taxes were due on the property. The bank's motion alleged that the failure of the taxing authority to provide proper notice of the appraised value of the property deprived the Bank of the opportunity for a hearing to protest the appraised value, assessment, and agricultural use exemption. The trial court granted Huffman's motion for summary judgment and denied the Bank's motion.

In its first and second points of error the Bank claims it was denied due process because it did not receive notice of the taxable value and assessment of the property before the tax became final. The Bank claims the Texas Property Tax Code denies a lienholder due process of law by failing to provide for notice to the lienholder of appraised value.

The Texas Property Tax Code provides that an appraisal review board must give notice to a property owner of the appraised value of his land. TEX. PROP. TAX CODE ANN. § 25.19 (Vernon 1982). The Bank contends that

by failing to prescribe notice to a lienholder, the property code is unconstitutional as a deprivation of due process.

The notice provisions, the method to contest valuations and taxes, and the procedures for judicial review contained in the Texas Property Tax Code afford complete due process protection to a property owner. *Brooks v. Bacchus*, 661 S.W.2d 288, 290 (Tex. App. – Eastland 1983, writ ref'd n.r.e.). In matters of taxation, the requirement of due process is satisfied if the party assessed is given an opportunity to be heard before some assessment board at some stage of the proceedings. *Texas Pipeline Co. v. Anderson*, 100 S.W.2d 754, 762 (Tex. Civ. App. – Austin 1937, writ ref'd). Since ad valorem taxes are only assessed against property owners, not lienholders, due process does not require notice be given to all lienholders.

The Bank claims *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) is dispositive of this appeal. That case states:

> Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. [Citations omitted] When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service.

Id. at 798.

Huffman and the county fully complied with the *Mennonite* case. *Mennonite* requires notice of a pending tax sale be given to a mortgagee. It is undisputed in this case that the Bank was given notice of the tax sale and

has been afforded an opportunity to be heard prior to the tax sale. The Bank's first and second points of error are overruled.

In its third point of error the Bank claims the trial court erred in "summarily holding that the phrase 'property owner,' " does not include a lienholder. Property owner has been defined as "an owner of property." Owner is defined as "one who owns; a proprietor, one who has the legal or rightful title, whether the possessor or not." *Bennett-Barnes Investments Co. v. Brown County Appraisal Dist.*, 696 S.W.2d 208, 209 (Tex. App. – Eastland 1985, writ ref'd n.r.e.). A lienholder does not own legal title to the property on which he holds a lien. *Bankers Home Bldg. & Loan Ass'n v. Wyatt*, 139 Tex. 173, 162 S.W.2d 694, 696 (1942). A lienholder is not a property owner. The Property Tax Code requires notice only be given to a property owner, and since, in 1985, the Bank was not a property owner, the Property Tax Code does not require notice, valuation and assessment be given to the Bank as lienholder. The Bank's third point of error is overruled.

The judgment of the trial court is affirmed

/s/ William E. Junell
Justice

Judgment rendered and Opinion filed February 23, 1989.
Panel consists of Chief Justice J. Curtiss Brown and Justices Junell and Draughn.
Do not publish. TEX. R. APP. P. 90.

APPENDIX B

February 23, 1989.

[Seal]

JUDGMENT
THE FOURTEENTH COURT OF APPEALS

FIRST NATIONAL BANK
OF BELLAIRE, APPELLANT

NO. A14-88-00352-CV V.

HUFFMAN INDEPENDENT SCHOOL
DISTRICT, ET. AL., APPELLEES

This cause, an appeal from the judgment in favor of Huffman Independent School District, et. al. signed March 1, 1988, came on to be heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below affirmed.

We order First National Bank of Bellaire and its surety, Reliance Insurance Company, jointly and severally, to pay (1) all costs incurred by reason of this appeal, (2) the sum or sums adjudged to appellee plus interest at the legal rate from the date of the trial court judgment until paid, and (3) all costs that appellee has incurred, both in this court and in the court below. This decision is ordered certified below for observance.

APPENDIX C

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTIS BROWN
CHIEF JUSTICE

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
JUSTICES

MARY JANE SMART
CLERK

HELEN A. CASSIDY
CHIEF STAFF
ATTORNEY

PHONE
713-655-2800

March 23, 1989

Hon. Decatur J. Holcombe
Royston, Rayzor, Vickery & Williams
2200 Texas Commerce Tower
Houston, TX 77002

Hon. Michael J. Darlow
Prappas & Darlow
3120 Southwest Freeway
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Houston, TX 77098

Hon. John G. Garza
Assistant County Attorney
1001 Preston
Suite 634
Houston, TX 77002

RE: CASE NO. 14-88-00352-CV TRIAL COURT CASE NO. 86-32290

STYLE: First National Bank of Bellaire
V: Huffman Independent School District

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, April 24, 1989.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

APPENDIX D

IN THE SUPREME COURT OF TEXAS

June 28, 1989

NO. C-8656,	)	
FIRST NATIONAL BANK OF BELLAIRE	)	From HARRIS County, Fourteenth District
vs.	)	
HUFFMAN INDEPENDENT SCHOOL DISTRICT and THE STATE OF TEXAS – COUNTY OF HARRIS	)	

Application of petitioner for writ of error to the Court of Appeals for the Fourteenth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, First National Bank of Bellaire, and surety, Reliance Insurance Company, pay all costs incurred on this application.

APPENDIX E

IN THE SUPREME COURT OF TEXAS

NO. C-8656,	)	October 11, 1989
FIRST NATIONAL BANK OF BELLAIRE	)	From HARRIS County, Fourteenth District
vs.	)	
HUFFMAN INDEPENDENT SCHOOL DISTRICT and THE STATE OF TEXAS - COUNTY OF HARRIS	)	

Petitioner/s motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX F

NO. 86-32290

HUFFMAN INDEPENDENT SCHOOL DISTRICT	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
I. T. MAY, JR., TRUSTEE	§	215TH JUDICIAL DISTRICT

FINAL SUMMARY JUDGMENT

ON THE 21st day of January, 1988, the Court heard the Plaintiff's, HUFFMAN INDEPENDENT SCHOOL DISTRICT and Intervenor's, STATE OF TEXAS AND COUNTY OF HARRIS Motion for Summary Judgment and the Defendant's FIRST NATIONAL BANK OF BELLAIRE Motion for Summary Judgment; The parties appeared by and through their respective counsel, and having examined the pleadings and the summary judgment evidence and having heard the arguments of counsel; the Court finds that the Motion for Summary Judgment of the Defendant should be denied and that the HUFFMAN INDEPENDENT SCHOOL DISTRICT and the STATE OF TEXAS AND COUNTY OF HARRIS are entitled to Summary Judgment in their favor upon the hereinafter described property, located in Harris County, Texas, to-wit:

> Tract two (2), consisting of 379.74 acres in Abstract Sixty-two (62), John R. Rhea Survey, located in Harris County, Texas.

It is therefore ORDERED, ADJUDGED and DECREED that the Plaintiff, HUFFMAN INDEPENDENT SCHOOL DISTRICT, recover the following aggregate sum of *$24,736.67* due for the tax year *1985;* inclusive, for delinquent ad valorem taxes, penalties and interest upon the described property owned by said Defendant, and that said aggregate sum of money shall bear interest from the date of this Judgment until paid at the rate of Ten (10%) percent per annum and for such Court costs as may be provided by law.

It is further ORDERED, ADJUDGED and DECREED that the Intervenor, STATE OF TEXAS AND COUNTY OF HARRIS, recover the following aggregate sum of *$7,628.63* for the tax year *1985;* for delinquent ad valorem taxes, penalties and interest upon the described property owned by said Defendant, and that said aggregate sum of money shall bear interest from the date of this Judgment until paid at the rate of Ten (10%) percent per annum and for such Court costs as may be provided by law.

It is further ORDERED, ADJUDGED and DECREED that the Intervenor, STATE OF TEXAS AND COUNTY OF HARRIS, does have and recover the sum of *$1,144.29,* as reasonable attorney's fees, which said sum equals fifteen (15%) percent of the total amount of taxes, penalty and interest recovered in this suit; and shall bear interest at the rate of Ten (10%) percent per annum until paid.

It is further ORDERED, ADJUDGED and DECREED that the Plaintiff, HUFFMAN INDEPENDENT SCHOOL DISTRICT does have and recover the sum of THIRTY-SEVEN and 50/100 ($37.50) DOLLARS, such amount being the reasonable expenses incurred by Plaintiff for

procuring data and information as to the name, identity and location of necessary parties and for procuring necessary legal description of the property herein above described.

It is further ORDERED, ADJUDGED and DECREED that the Tax Master, MARK DAVIDSON appointed by this Court be awarded the sum of $75.00 as a masters fee to taxed as court costs.

It is further ORDERED that first, paramount and superior tax liens against the above described parcel or parcels of land for the aggregate amount of taxes, penalties, interest and costs hereinabove adjudged to be due thereon to Plaintiff and Impleaded Party Defendant together with all costs of suit due each and all of said parties and all other costs authorized by law, which liens are hereby separately foreclosed upon said parcel of land for said aggregate amounts hereinabove set out, and all other costs authorized by law.

It is further ORDERED that an Order of Sale be issued by the Clerk of this Court, directed to the Sheriff or Constable of Harris County, Texas, commanding such officer to seize, levy upon, advertise for sale and sell as under execution, the above described parcel or parcels of land, and all the right, title and interest of the Defendant hereinabove named therein, at public auction, to the highest bidder for cash, as provided by law, and said property shall be sold free and clear of all liens held by the Defendant hereinabove named, as same are hereinabove set out, provided this Judgment and the foreclosure of Plaintiff's and Impleaded Party Defendant's

tax liens, as set out above, are without prejudice to Plaintiff's and Impleaded Party Defendant's tax liens for taxes which have accrued or become delinquent since the filing of this suit, and the property involved herein shall be sold without prejudice to said tax liens, and further provided, however, that said property shall not be sold to the owner thereof directly or indirectly, or to anyone having an interest therein, or to any party other than a taxing unit which is a party to this suit for less than the amount of the adjudged value of said property or the aggregate of the amounts of the Judgments against said property, whichever is lower. Said adjudged value or reasonable fair value of the property hereinabove described at the time of trial, as set by this Court in accordance with the requirements of law, is as follows: $949,330.00

It is further ORDERED that the owner of such property, or anyone having an interest herein, or their heirs, assigns, or legal representatives, may within two (2) years from the date of such sale, redeem said property, as provided by law, and in addition to redeeming direct from the purchase, redemption may also be made from the Tax Collector of the County in which said property was sold, in the event that the purchaser at the tax sale cannot be located, as provided by law.

It is further ORDERED that the officer executing the Order of Sale shall make proper conveyance to the purchaser or purchasers of said land, under and by virtue of said sale, or to any other person to whom the purchaser may direct the conveyance to be made, upon their compliance with the terms of sale, in which such deed, the right of redemption, as provided by law, shall be expressed and said sale made subject thereto.

It is further ORDERED that the Clerk of this Court shall withhold the issuance of a writ of possession to the land above described and ordered sold, or any party thereof, until the expiration of the period of redemption fixed by law, and if, before the expiration of said period of redemption, no person who is entitled to redeem the said property has exercised the right of redemption, then, at that time, a writ of possession shall immediately be issued by the Clerk of this Court, ordering the Sheriff or other proper officer to place the purchaser or purchasers, or their heirs, executors, assigns or administrators, in possession of the property so purchased, or any part thereof, at the sale provided for in this Judgment.

If the property herein described is sold to any taxing unit which is a party to this suit, the title to said property shall be bid in and held by the taxing unit purchasing same for the use and benefit of itself and the other taxing units which are parties to this suit and which have been adjudged in this suit to have tax liens against said property. Said property to be sold by said purchasing taxing unit in the manner provided by law and the proceeds of said sale to be distributed to the taxing units that are parties to this suit in the manner as provided by law.

It is further ORDERED, ADJUDGED and DECREED that the purchaser of the property herein described shall take title free and clear of all liens and claims for ad valorem taxes against said property delinquent at the time of Judgment in said suit to any taxing unit which is a party to this suit, or which has been served with citation in this suit as required by law.

SIGNED this the 1st day of March, A.D., 1988.

The District clerk is ordered to prepare a cost bill only upon the request of a party or of an officer with uncollected costs outstanding.

/s/ Eugene Chambers
Judge Presiding

APPROVED AS TO FORM:

PRAPPAS & DARLOW, P. C.

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By: MICHAEL J. DARLOW
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STATE OF TEXAS,
COUNTY OF HARRIS

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FIRST
NATIONAL BANK
OF BELLAIRE

APPROVED AS TO
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